DOES THE WRITING OF WORDS OF REVOCATION ACROSS THE FACE OF A WILL CONSTITUTE SUCH A CANCELLATION OR OBLITERATION AS WILL REVOKE THE WILL?

THE right to dispose of property by will has always been regarded as one of our most valuable possessions. It is a fundamental instinct with men to desire the power to direct how their property should be distributed after death. In order that this right may be exercised, the English and the American laws have invested the execution of a will with such formalities as will best insure the performance of the intention of the testator. Such a will, formally executed, is perhaps the most important and solemn document known to the law. Coequal with the right to make a will is the right to revoke it. It is evident, therefore, that the manner in which a will may be revoked is a subject of the utmost importance.

A will may be revoked by destroying it physically with the intention of revoking it. This destruction may be accomplished by burning, tearing or doing away with it in any other manner. Secondly, the revocation of a will may be accomplished by making a new will which is a substitute for the old will and therefore *ipso facto,* revokes it. Similarly a will may be revoked by the execution of a separate and independent instrument declaring its revocation. Such an instrument is in effect another will and must be executed with the same formalities that are required by law for the execution of a will. Finally, a will may be revoked by making some effective indication on its face declaring its revocation. An instrument of revocation can of course be executed on the face of the will. But in order to be operative as an instrument of revocation, it must be executed with the same formalities that are required for wills; and the fact that such an instrument is written across the face of a will would be merely incidental and would not add to its effectiveness as a written revocation. The face of the will may, however, be so dealt with as to revoke the will without writing

thereon any words of revocation. This may be accomplished by taking such action (without destroying the will itself) as will indicate a desire on the part of the testator to nullify the words of the will. The two methods recognized by law for achieving this result are known as *cancellation* and *obliteration.* Accordingly, the revocation of wills by cancellation or by obliteration is a distinct method for accomplishing the desired result.

The English and American statutes provide for the revocation of wills in all these different methods. The New York law on the subject is to be found at Section 34 of the Decedent Estate Law which may be taken as typical of the statutes of the different States. That section reads as follows:

> "SEC. 34. REVOCATION AND CANCELLATION OF WRITTEN WILLS. —No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked, or altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator; and the fact of such injury or destruction, shall be proved by at least two witnesses."

It will be noted that this statute includes all the methods of revocation which have been mentioned, but does not group them according to the analysis which we have attempted to make.

At the outset, the question arises as to the difference between *cancellation* and *obliteration.* On this point, there has been much confusion, both of thought and of expression. It may be well to begin with the etymology of the two terms. The word *cancellation* is derived from the Latin verb, *cancellare,* which in turn takes its origin from the plural noun, *cancelli,* meaning lattice work. The original meaning of the word, therefore, according to its etymology is to make cross marks resembling a lattice work over a writing and thus to cross or mark it out. The word *obliteration* is rooted in the Latin verb, *oblinere,*

which means originally to daub over with some other substance. In the present connection, therefore, to obliterate a writing is, according to the etymological origin of the word, to daub or smear over the writing with some other substance. From this early meaning, there soon sprung others of a kindred nature so that to obliterate soon meant not only to daub with another substance but to smear the original writing and then to erase it.

It will be readily seen that the two words, although distinct in origin and having originally a different meaning inevitably tend to merge into each other. If the marks or lattice work constituting a cancellation are sufficiently numerous and heavy and close together, they will soon cover entirely the original writing and thus constitute in effect an obliteration. On the other hand, a writing may be daubed by a foreign substance or smeared in such a way that the words are not completely hidden. This partial obliteration would be very hard to distinguish from a cancellation or marking out. For illustration, a heavy line may be drawn through a word so as to cover one-half of the writing. This would be a partial obliteration but it would also be a marking or a crossing out and consequently would constitute a cancellation as well as an obliteration. This merger in the meaning of the two words has been recognized in several cases. For instance, in *Glass* v. *Scott,*[1] the court said:

> "The only opportunity for debate * * * depends on the possibility of giving the words 'cancellation and obliteration' different and distinct meanings. We are justified in concluding that neither justify nor permit different definitions, both in view of what lexicographers have written on the subject and in view of the decision of distinguished courts on the same proposition. Neither our statute nor that of Charles, nor any other statute of any State to which our attention has been directed, attempts to declare what shall amount to cancellation or what shall amount to obliteration. The words are not technical and the legislatures must be presumed to have used them in their ordinary sense and according to their ordinary signification. * * * Long before the statutes or any of them were passed, these words had passed into common use and had acquired an accepted signification which has continued to

[1] 14 Colo. App. 377, 382, 60 Pac. 186.

> the present. An obliteration or a cancellation would be either one or the other, and effective as such if done with an intent to destroy an instrument and render it ineffectual for the purposes for which it was originally put into circulation."

In that case the Colorado statute only provided for revocation by obliteration and did not include revocation by cancellation. The testatrix, Mary Glass, had drawn a straight line through the signature to the proposed will and had also drawn two lines diagonally through the same signature. The court held that this was both a cancellation and an obliteration and was sufficient under the Colorado law to revoke the will.

On the other hand, in *Townsend* v. *Howard*[2] a distinction is drawn between cancellation and obliteration. The court says:

> "To cancel is to cross out. To obliterate is to blot out. The former leaves the words legible. The latter leaves the words illegible."

In that case, the signatures to the will were written over or erased by lead pencil marking, while lines were drawn through a clause of the will, leaving a certain legacy. The court held that the testator had revoked his will, both by cancellation and by obliteration, apparently holding the marking over of the signatures to be an obliteration and the drawing of lines through the legacy clause to be a cancellation. In most cases the distinction between cancellation and obliteration is of no importance. If lines of any kind are drawn across the body of the will or through the signature of the testator and the evidence shows that this was done for the purpose of revoking the entire will, then such act is either cancellation or obliteration and in either event, the will is revoked.

Of course, however, the revocation of a will by a separate instrument containing words of revocation is an entirely different thing from the revocation of a will by means of cancellation or obliteration. Where the revocation is sought to be accomplished by a separate instrument containing appropriate words of revocation, the instrument must be executed before the same number of witnesses and in the same manner required by law for the

[2] 86 Me. 285, 288, 29 Atl. 1077.

execution of a will. If the words of revocation are written across the face of the will, they are not effective as a separate instrument of revocation unless signed and executed with these formalities. The fact that the words of revocation are written across the face of the will does not increase their effectiveness as a separate instrument of revocation. But the interesting question then arises as to whether such words of revocation written across the face of the will constitute a cancellation or obliteration of the will and thus accomplish its revocation.

A rather extraordinary case involving this question has just been decided in the Surrogate's Court of Westchester County, New York, and reported in the New York Law Journal, July 13, 1922, under the title *In the Matter of George W. Parsons.* The testator, George W. Parsons, was a resident of Hoboken, New Jersey and died in the County of Westchester on July 12th, 1921. In his safe deposit box was found a holographic will, dated March 1st, 1873, and written upon a single sheet of paper bearing the decedent's business letter-head. This will read as follows:

"New York, March 1, 1873.

"IN THE NAME OF GOD, AMEN.

"I, GEO. W. PARSONS, of Brooklyn, N. Y., being of sound mind and memory and considering the uncertainty of mortal life, do, therefore, make, ordain, publish and declare this to be my last will and testament. That is to say:

"FIRST: After my lawful debts are paid and discharged, the residue of my estate, real and personal, I give, bequeath and dispose of as follows, to wit: to Mary Elizabeth Parsons, my only surviving sister, one-half; also to my said sister, one-quarter; said quarter to be held by her in trust for the benefit of my father, Jabez Parsons and the remaining one-quarter to the two Protestant Episcopal Bishops of the dioceses of Long Island and New York, in trust, for the benefit of feeble parishes in those dioceses. Likewise, I make, constitute and appoint my said sister, Mary Elizabeth Parsons, to be executrix, and W. S. Dunham, of Brooklyn, New York, executor of this my last will and testament.

"In WITNESS WHEREOF, I have hereunto subscribed my name and affixed my seal the first day of March, A. D., 1873.

"Geo. W. Parsons."

Will.

GENERAL AGENCY OF

Connecticut Mutual Life Insurance Company

JAMES GOODWIN Pres
W. S. OLMSTED Secty

Dunham & Sherman Genl Agents
for New York, Long Island & New Jersey.

191 Broadway & 111 Fifth Ave New York March 1st 1873

In the name of God, Amen, I Geo W Parsons of Brooklyn, N.Y. being of sound mind and memory and considering the uncertainty of mortal life, do therefore make, ordain, publish and declare this to be my last Will and Testament, That is to say, First after all my lawful debts are paid and discharged, the residue of my estate, real and personal I give, bequeath and dispose of, as follows, to wit

To Mary Elizabeth Parsons, my only surviving sister ~~sister~~, one half; also to my said sister, one quarter said quarter to be held by her, in trust, for the benefit of my Father Julius Parsons, and the remaining one quarter to the two Protestant Episcopal Bishops of the dioceses of Long Island and New York, in trust, for the benefit of feeble parishes in those dioceses. Likewise I make, constitute and appoint my said sister, Mary Elizabeth Parsons to be executrix ~~and H. S. Monkhouse of Brooklyn N.Y. executor~~ of this my last will and testament. In witness whereof I have hereunto subscribed my name and affixed my seal, the first day of March A.D. 1873

Geo. W. Parsons (L.S.)

The within written instrument was subscribed by the said Geo W. Parsons in our presence and acknowledged by him to each of us and he at the same time published and declared the within instrument so subscribed to be his last will and testament; and we, at the testators request, and in his presence, have signed our names as witnesses hereto and written opposite our names our respective places of residence

Hiram P. Crozier
1300 Dean St
Brooklyn N.Y.

Wm Jones 317 Herkimer St
Brooklyn N.Y.

C. Vanderhoof East Orange New Jersey

Codicil

My sister, Mary Elizabeth Parsons is hereby Constituted sole executrix of this my last will & testament and the name of W. S. Dunham was erased by me & his appointment as Executor revoked. W.S. Geo. W. Parsons

Dated in 1877.

Geo. W. Parsons Will

The attestation clause and the signatures of the subscribing witnesses and some other memoranda were written upon a second and separate sheet of paper. Apparently the will was executed with all the formalities required by law. Across the face of the will and almost at right angles were the words "Will revoked, Geo. W. Parsons", with lines or a flourish beneath the signature. This signature, "Geo. W. Parsons," was directly beneath the words, "Will revoked", and the writing of these words and of the lines or flourish beneath, run across the lower nine lines of the will. In like manner across the upper thirteen lines of the will including the date line are the words, "This will is revoked, Geo. W. Parsons" with lines or a flourish beneath that signature also. There are only twenty-three lines in the will so that these two inscriptions cross every line of the will except one. The line which is not crossed does not contain any separate clause and the words on that line are not intelligible except in connection with the words on the other lines of the will. It is conceded that the will is in the handwriting of the decedent George W. Parsons and that the inscriptions across the face of the will are all in his handwriting. Inasmuch as the will was found in Mr. Parson's safe deposit box with the inscriptions written thereon, there is a presumption that these inscriptions were written by him with the intention to revoke the will.[3]

The will was first offered in the Surrogate's Court of New York County. Surrogate Cohalan, a most able and experienced jurist, held that the will was not revoked and entered a decree admitting it to probate.[4] He held that the words of revocation were not effective as an independent instrument of revocation because they were not executed with the same formalities with which the will itself was required by law to be executed. He held further that the writing of these words across the face of the will was neither a cancellation nor an obliteration such as would revoke the instrument. On this point he says:

> "Proceeding to the second part of Section 34 of the Decedent's Estate Law, there is no doubt that the will was not burned, torn, obliterated or destroyed; but was it cancelled? To

[3] Matter of Hopkins, 172 N. Y. 360, 363.

[4] 117 Misc. Rep. (N. Y.) 753. See 8 VA. LAW REV. 624.

'cancel' in its primary definition (Standard Dictionary) means, to 'mark out or off, as by drawing or stamping lines across to signify that it is to be omitted'; or draw lines across 'something written so as to deface' (Century Dictionary); to 'blot or obliterate' (both dictionaries). 'Cancellation' in its legal significance is defined (Bouvier L. Dict., 3rd ed., 416), as 'the act of crossing out a writing; the manual operation of tearing or destroying a written instrument'. It has been held that 'there can be no such thing as a cancellation of an instrument either as a physical fact or as a legal inference, unless the instrument itself is in some form defaced or obliterated'. *Matter of Akers,* 74 App. Div., 461, 466; aff'd., 173 N. Y. 620. In the Akers case the will was holographic, as in this case, and it was written upon legal cap paper, which contained a marginal line to the left. In the blank margin of space and running lengthwise the testator had written the words 'this will and codicil is revoked. January 14, 96', and under such words had affixed his signature. In that case none of the words of revocation were written across any other writing of the will itself. The court held that there was no revocation or cancellation. That the case was decided on the ground that an examination of the will disclosed the fact that there were no marks on the body of the will which in any way cancelled or obliterated in any particular, stating that in the cases called to the attention of the Court there had been a physical cancellation of some of the words of the will, accompanied by an intent to cancel. In this will before the court there is no obliteration. True the words are written across the face of the will instead of on the margin, as in the Akers case, but as there is no obliteration or blurring out of the contexts of the will, the same reasoning applies to the facts in this case as was applied by the court in the Akers case. The testator on this will has written and expressed an intent to revoke his will, but has failed to complete and carry out such intent by the physical act of obliteration or cancellation. The usual method of cancelling any writing is by drawing lines through it or otherwise striking it out. In this case there is an abortive attempt to revoke this will by 'some other writing', ineffective on the first part of the statute to accomplish such result and unaccompanied by any obliteration sufficient to accomplish the result as a cancellation under the second part of the statute. In the Akers case the opinion states that 'the great weight of authority is to the effect that the mere

> writing upon a will which does not in anywise physically obliterate or cancel the same, is insufficient to work a destruction of the will by cancellation, *even though the writing may express an intention to revoke or cancel'*. Such is the case in the will now before the court. This will is sought to be revoked by the testator solely by writing and as it does not comply with the statute the revocation has failed. Failing of revocation by writing, reliance cannot be had on the words alone to effect a cancellation of the will. Such words must be disregarded when they are insufficient physically to accomplish this result."

It is evident that Surrogate Cohalan based his decision on the authority of the Akers case. As appears however from his own statement of the facts, the words of revocation in that case did not cross any of the writing which construed the will, as those words were written on the blank marginal space. It it difficult to understand how, under such circumstances, there could be any obliteration or cancellation. As was said in the Akers case: [5]

> "An examination of the will, however, does not disclose the slightest mark upon the body of the will which in any form cancels or obliterates it in any part. On the contrary, it is quite evident that the surname of the testator is placed slightly above the line of the given name, and evidently for the purpose of avoiding contact with the words of the will, and the whole writing has not canceled a single letter. There can be no such thing as a cancellation of an instrument, either as a physical fact or as a legal inference, unless the instrument itself is in some form defaced or obliterated. Such is the express definition of the term in legal significance. (1 Burr. Law. Dict. 177.)"

After the will had been admitted to probate by Surrogate Cohalan in New York County, and while an appeal was pending from that decree, it was discovered that the Surrogate's Court of New York County had no jurisdiction to entertain an application for the probate of the will, as the decedent had not died in that county and was not a resident thereof. Accordingly a petition was filed to vacate the decree of probate upon these jurisdictional grounds, which was granted.

Then one of the legatees under the will, the Protestant Epis-

[5] 74 App. Div. 461, 466; affirmed, 173 N. Y. 620.

copal Bishop of the diocese of Long Island, made an application in Westchester County, in which county Mr. Parsons had died, that the will be admitted to probate. This application came up before Surrogate Slater, a competent and learned official. He heard argument, took briefs and reached a conclusion diametrically opposite to that which had been expressed by Surrogate Cohalan. Surrogate Slater decided that the words and flourishes written across the face of the will so as to cross every line but one of the writing of the will constituted a cancellation or an obliteration within the meaning of Section 34 of the Decedent Estate Law of New York.

Surrogate Slater held: [6]

> "The paper writing was canceled, defaced and obliterated when the testator wrote the words of revocation thereon, bringing it well within the dictum in *Matter of Akers* (74 App. Div., 461, at 466; aff'd 173 N. Y., 620), and well within the definition of cancellation as the act of crossing out a writing, the manual operation of tearing or destroying a written instrument. (Bouvier's Law Dictionary, 3d ed., 416). It is the court's opinion that the words used in the case of Akers, 'the great weight of authority is to the effect that a mere writing upon a will, which does not in anywise physically obliterate or cancel the same, is insufficient to work a destruction of the will by cancellation, even though the writing may express an intention to revoke or cancel' was meant to refer only to the particular facts of that case. The words of revocation in the case of Akers were on a *margin* of the paper writing and not *across the face of the will.* When words of revocation with the signature are written diagonally across the face of the words of the will it obliterates them, it cancels them and expresses an intention to annul them. The case of Akers resembles the *Matter of Miller* (50 Misc., 70) where an endorsement indicating words of revocation was upon the back of the will. In the Miller case the court declined to follow *Warner* v. *Warner* (37 Vermont, 356) and *Witter* v. *Mott* (2 Conn., 67) as being unsound law. The decisions upon the revocation of wills by act of cancellation or obliteration are divided into two classes, (1) those that deal with words of revocation written upon some portion of the paper writing other than across the written words of the will, and (2) the

[6] NEW YORK JOURNAL, July 13, 1922.

other class where the words of revocation are actually written across the written words of the paper writing itself. In the first class is found *Howard* v. *Hunter* (115 Ga., 357), where the court says: 'In order for an obliteration or canceling to be effective as a revocation it is necessary that the obliteration or cancellation should be upon the will itself, and be of such a character as to indicate clearly that it is the intention of the testator that the paper should be no longer operative as a will.' This ruling was followed in *Oetjen* v. *Oetjen* (115 Ga., 1004) *In re Shelton's Will* (143 No. Car., 218), *In re Ladd* (60 Wis., 187), *Dowling* v. *Gilliland* (286 Ill., 530, 1919). In the last case the will consisted of a single sheet of paper. Written on the back were words of revocation, and written between the date and the attestation clause were the words 'Not any good', with the date in the handwriting of the decedent. No words of the will were stricken out by the notation and the ruling therein followed the case of Akers (*supra*). The court employs these words: 'That where such notation does not *in any way obliterate the writing,* it cannot be said to cancel, and therefore such notation could only be held effective as a revocation of the will as a writing, and as it is unattested, it does not comply.'

"In the second class there are no cases in the Court of Appeals upon this question. In this jurisdiction we have the opinion of former Surrogate Ketcham in the *Matter of Barnes* (76 Misc., 382), and the court is disposed to follow the reasoning set forth therein as the law upon the facts in the instant case. That case was decided upon nearly identical facts as we have presented here. In *Glass* v. *Scott* (14 Colo. Appeal, 377) a line was drawn through the signature and across the signature. The court held it was such an obliteration as amounts to a revocation, although the name was still legible. The court in this case employs these words: 'Cancellation or obliteration may be effected by words written across the instrument. Any act of this sort is effectual for the reason that it puts the instrument in condition whereby its invalidity appears on its face the moment it is produced.' In *Noesen* v. *Erkenswick* (298 Ill., 231, June, 1921) words of cancellation were written across the face of the will and signed by the testator. The court employs these words: 'If a cancellation could be made by any writing across the face of a will, this will was revoked. * * * Of course, a will may be canceled by erasing its provisions, or rendering

them illegible, which would amount to the destruction of the will, but to cancel does not necessarily mean that. It does mean to disannul, to nullify and declare null and void the instrument. * * * It would be going far beyond the statute to say that a will is not canceled unless the words are erased or obliterated so that the nature of the will before cancellation or its provision cannot be discerned' (*Woodfill* v. *Patton,* 76 Ind., 575). In *Evans' Appeal* (58 Pa., 238) the will was cancelled by an act done to the will. Lines were drawn across part of the will and through the signature. The court held that such acts stamp upon it an intention that it should have no effect. 'Obliteration in the will is not confined to effacing letters so they cannot be read. A line drawn through writing is obliteration, though it may leave it as legible as before. The words burning, canceling, obliterating and destroying are used in the popular sense. Cancellation of a will means any act done which in common understanding is regarded as cancellation when done to any other instrument. It must be an act done to the will itself, and on the will itself, by words which manifest an intent to annul it.' * * *

"The Legislature meant something by the word 'cancel'. I can visualize nothing more certain of a person's intent than his actual words to revoke and his signature written across the face of a paper writing. His very words manifest an intent to annul it. The act conveyed his mind to the paper as provided by law, and such an act is a kind of revocation recognized by the Legislature. Cancellation does not require a signature under the statute, but in the instant case a signature was added.

"The law does not declare what shall amount to cancellation. Obliteration is not meant as nothing short of effacing the letters of a will so completely that they cannot be read. A line drawn through a writing is doubtless obliteration. though it may leave it as legible as it was before. Obliteration is not annihilation, but we must have both an act and intent concurring. The fact that the testator used the word revoke is of importance. It is the intent that governs, and if that is clear from the words that are used, the act itself will satisfy the law. The burden of proof is upon the party asserting revocation, but no testimony is present, and the intention must come from the paper writing itself. The testator performed an act when he wrote upon the will itself the word 'revoke', which manifests an intention to annul it. Such an act is recognized by the Legislature as a thing to be

done to the face of the paper upon which the will is written. It indicates a preservation of the paper and a statement of the fact that it has ceased to be operative. The act, the words, the signature, exhibit the testator's intent to cancel, obliterate and annul. The finding of the will in the testator's safe deposit box with its written words of revocation raised the presumption that the cancellation was done by him with the intention to revoke it, *animo revocandi* (*Matter of Clark,* 1 Tucker, 455; *Matter of Hopkins,* 172 N. Y., 360, 363). Where a will, after the same has been canceled, is preserved and is not destroyed, in the absence of facts of some kind to show that others had an interest in or opportunity to cancel the instrument, it will furnish the *best* evidence as to the intention of the maker thereof to destroy its force and effect. (*In re Philips, supra; Collyer* v. *Collyer,* 110 N. Y., 481). * * *

"Since the only requirement is clearly recorded indicating the testator's intention to revoke exercised on a material part of the will, the court will hold upon the facts as presented that the testator legally revoked his last will and testament. It is the court's opinion that the decedent was well within the meaning and intent of the law when he wrote his words to indicate his intent, and that in fact and in law the will was revoked.

"Probate is denied. Decree accordingly."

The decision of Surrogate Ketcham of Kings County to which Surrogate Slater referred will be found in *Matter of Barnes.*[7] His opinion is interesting and convincing. It is as follows:

"After the due execution of the propounded paper, the following words and characters were written with red pencil upon its face, 'Null and Void. Daniel Heatley Barnes, Oct. 30th, 1910'.

"It is found that the writing last quoted was in the testator's hand and that the name was his signature.

"The words in question were imposed upon the writing which composed the will in such manner that many words of the will are crossed by the lines of the later writing. The will, all on one page, is about eight inches long, from its first line to the signature thereon, and the additional writ-

[7] 76 Misc. Rep. (N. Y.) 382, 383.

ing, taken as a whole picture, extends about six inches up and down the page. None of the red words or marks extends to the margin of the page. Every sentence of the will which contains any disposition of property is in some part intersected by the legend of revocation, except that the new writing does not reach the words with which the first sentence closes, viz., 'Revoking all former wills by me at any time made'. The signature upon the original writing is touched by a part of the later signature.

"There is no extrinsic evidence of the transaction, except that the will was in the custody of the decedent at his death, and, therefore, no proof of intent to revoke the will appears unless it may be derived from the act itself.

" 'No will in writing * * * shall be revoked * * * otherwise than by some other will in writing, or some other writing of the testator * * * executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person, at the direction and consent of the testator; and the fact of such injury or destruction, shall be proved by at least two witnesses' Decedent Estate Law, Sect. 34.

"As a writing declaring a revocation the act must fail.

"Remains the inquiry whether the will was 'canceled' with the intent and for the purpose of revoking the same.

"The marks intersecting the face of the will are such in extent and material that they would undoubtedly be regarded as an act of cancellation if they did not take the form of written words and the intent of revocation should appear. Have they any less or other significance if they are found to assume a legible character?

"It does not seem to require argument that the writing, taken with the transaction in which it was made, was both an act and a declaration tending to show the intent to revoke.

"Such intent being so found, was there added thereto any of the manual acts which the statute contemplates as a means of affecting such intent?

"An instrument of revocation may be separate from the will, but the other acts prescribed or recognized in the statute as methods of revocation are without virtue unless their op-

eration physically affects the material which is presented as the face and content of the will.

"The present case may be confined to the inquiry whether the will was canceled. The contrast in the statute of the words 'canceled' and 'obliterated' suggests for each its separate and literal meaning, but for the present purpose no nicety need be indulged. Did the testator either 'cancel' or 'obliterate' his will?

"If, instead of the lines which form this writing, there were lines which equaled their length and breadth, but which took no verbal form, they would serve as canceling marks. The only office which lines upon the face of a will need fulfill in order to invoke the warrant of the statute quoted *supra* is that they shall be a manual indication by the testator of the mental conception that he intends to annul his will. Their form and extent or other essence are all totally unimportant so long as they are a physical token of the inward intent.

"If the marks, in the light of all surroundings, symbolize this purpose, their mission is performed whether they be plain or fantastic, mechanical or verbally intelligible. Though traced in the form of letters, the lines in this case were drawn across the will with the statutory intent that it should thereby become null and void.

"In *Matter of Akers,* 74 App. Div. 461, the court held that words of revocation written and signed upon the paper on which the will was written were to be narrowly regarded as a writing of the testator and not a cancellation.

"The words in that case were wholly written upon the margin of the original instrument, and the court said: 'It is quite evident that the surname of the testator (in the supplemental writing) is placed slightly above the line of the given name, and evidently for the purpose of avoiding contact with the words of the will, and the whole writing has not canceled a single letter.'

"The processes and conclusion of the court in that case so obviously indicate a conviction that the contrary result would have been reached if the additional writing had trespassed upon the face of the primary instrument, that a trial court should submit its judgment to the implied view, even though it need not be necessarily regarded as a controlling authority. This is more readily done since the reasoning of the case is acceptable to this court.

"In addition to the quotation already made, the opinion con-

> stantly repeats, as the essential basis for the decision, the fact that the later writing did not touch the original script. The case at bar cannot escape the effect of the following words from the last case cited: 'Here we have no obliteration whatever, and nothing except the writing upon the margin of the will and the purported codicil. In all of the cases to which our attention has been called there has been a physical cancellation of some of the words of the will, accompanied by an intent to cancel (citing cases). The great weight of authority is to the effect that a mere writing upon a will which does not in anywise physically obliterate or cancel the same is insufficient to work a destruction of the will by cancellation, even though the writing may express an intention to revoke and cancel.'
>
> "There must be a decree refusing probate."

An appeal has been taken from the decision of Surrogate Slater to the Appellate Division of the Supreme Court. In the opinion of the writer Surrogate Slater will undoubtedly be affirmed in that court upon the grounds set forth in his own able opinion, and also in that of Surrogate Ketcham in the Barnes case.

There is a somewhat elusive thought involved in the consideration of this question. It is this: Neither Mr. Barnes nor Mr. Parsons intended to make lattice work marks across the face of their respective wills; neither did they have any thought of obliterating their wills in the sense of smearing them over with ink or other foreign substance, or of erasing them. They intended to do just what they did: i. e., to write words of revocation, or as Surrogate Ketcham expressed it, "a legend of revocation" across the face of the will. But in and by writing these words they did draw lines across the face of their respective wills with the intention of revoking them. And to draw a line across the face of a will *animo revocandi* is to cancel or to obliterate it, and so they did cancel or obliterate their wills under the provisions of the statute. They did the thing named in the statute and with the intent required by the statute. The decisions of Surrogate Slater and of Surrogate Ketcham effect the intention of the testator and are evidently in accordance with justice as well as in compliance with the statute.

It may be said that this is a minute point for such a lengthy discussion. On the contrary it is a most important question. It is a very natural thing for a man who has made a will and wishes to revoke it to write informal words of revocation across the face of a paper. Large interests have been and will be affected by the question as to whether such an action constitutes a revocation. The subject is worthy of careful consideration at the hands of the law student and the practicing lawyer.

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